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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/711,704	09/30/2004	Sean P. Selover	101896-0283	5703
21125	7590	03/03/2009	EXAMINER	
NUTTER MCCLENNEN & FISH LLP WORLD TRADE CENTER WEST 155 SEAPORT BOULEVARD BOSTON, MA 02210-2604			SWIGER III, JAMES L	
			ART UNIT	PAPER NUMBER
			3775	
			NOTIFICATION DATE	DELIVERY MODE
			03/03/2009	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

docket@nutter.com

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/711,704	SELOVER ET AL.
	Examiner JAMES L. SWIGER III	Art Unit 3775

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 16 September 2008.
- 2a) This action is **FINAL**.                                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-17 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-17 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 4/23/2008 is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) Notice of Informal Patent Application
- 6) Other: \_\_\_\_\_.

## DETAILED ACTION

### *Drawings*

The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they include the following reference character(s) not mentioned in the description:

In Fig. 5A, "LT" and "M" is not defined.

Corrected drawing sheets in compliance with 37 CFR 1.121(d), or amendment to the specification to add the reference character(s) in the description in compliance with 37 CFR 1.121(b) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3 are rejected under 35 U.S.C. 102(b) as being anticipated by Moskovitz et al. (US Patent 5,741,261). Moskovitz et al. disclose a minimally invasive surgical method comprising the steps of forming an incision through tissue (see incision in skin, Fig. 2) that is located adjacent a vertebra (V), identifying a muscle plane between muscles (Col. 8, lines 1-45; note: as the skin is retracted and the subcutaneous fat dissected, a surgeon would be able to see the fascia), and inserting a blunt tip (such as Figs. 14 or 25), along a muscle plane between the incision and the vertebra. See Col. 7, lines 1-55). It is noted that Moskovitz et al. teaches that the present invention and method provides for a minimally invasive procedure as it utilizes existing, natural muscle planes between muscles to access the spine and cause minimal tissue damage and trauma in performing the procedure. Additionally Moskovitz et al. in Fig. 2 show two of the muscles, the multifidus (U) and Longissimus Thoracic muscle (H), have a shared muscle plane that is used to access the spine, as in the instant invention.

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 4-7 and 11-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Moskovitz et al.'261 in view of Teitelbaum (US Publication 2002/0082598). Moskovitz et al. disclose the claimed invention except for a method providing the steps

of inserting a guidewire through a lumen into the vertebra, removing a tool from the guidewire and inserting a spinal anchor, coupling a fixation element to a first anchor and performing the steps on a second anchor and guidewire. Teitelbaum discloses a minimally invasive system and method comprising the steps of inserting a guidewire through a lumen into the vertebra (see Fig. 11 and par 0076), removing a tool from the guidewire (see Figs. 12 and 13) and inserting a spinal anchor (Fig. 13, 208), and coupling a fixation element to a first anchor (214 and later Fig. 20, 222) and performing the steps on a second anchor and guidewire (see par 0079). It would have been obvious to one having ordinary skill in the art at the time the invention was made to perform the method of Moskovitz et al. having at least the above steps as taught by Teitelbaum to have not only a minimally invasive surgery with minimal trauma, but also have improved precision in delivering an spinal anchor device, as this area of the body with a such a small incision can have poor visibility.

Claims 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Moskovitz et al.'261 in view of Teitelbaum (US Publication 2002/0082598) as applied to claim 6 above, and further in view of Boehm, Jr. et al. (US Patent 6,666,891). The combination of Moskovitz et al. '261 and Teitelbaum disclose the claimed method except for specifically the use of a plurality of dilators to dilate tissue, wherein a final dilator or cannula provides access as the others are removed. Boehm, Jr. et al. disclose a method of accessing vertebra which utilizes a plurality of dilators to expand tissue (see fig. 5). The final dilator (similar to a cannula, 80) remains in place to allow the surgical procedure to take place. It would have been obvious to one

having ordinary skill in the art at the time the invention was made to perform the method of the combination of Moskovitz et al.'261 in view of Teitelbaum (US Publication 2002/0082598) having at least the steps of using a plurality of dilators to expand tissue in view of Boehm, Jr, et al. to allow consistent and sufficient access to the spinal area when performing the percutaneous surgery.

***Double Patenting***

No double patenting rejections were found.

***Response to Arguments***

Applicant's arguments with respect to claims 1-17 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

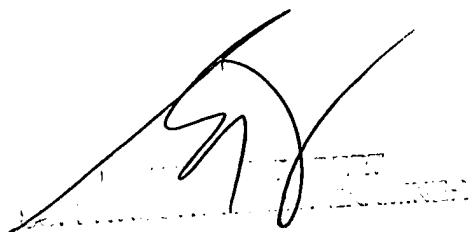
The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. See PTO-892.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES L. SWIGER III whose telephone number is (571)272-5557. The examiner can normally be reached on Monday through Friday, 9:00am to 5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JAMES L SWIGER/  
Examiner, Art Unit 3775

A handwritten signature in black ink, appearing to read "JAMES L SWIGER". The signature is fluid and cursive, with a large, stylized 'J' at the beginning.